

M A Y 2, 1768.

INFORMATION

F O R

ROBERT GEDDIE junior, Merchant in *Cupar in Fife*, and ROBERT MACKINTOSH, Esquire, Advocate,

• A G A I N S T

GEORGE DEMPSTER, Esq; of *Dunichen*.

THE District of Burghs, composed of the Towns of *Perth, Dundee, St. Andrews, Cupar in Fife, and Forfar*, was represented in the last Parliament of *Great Britain* by Mr. *Dempster of Dunichen*.

Mr. *Mackintosh* had a Connection with most of these Burghs, and, in some of them a considerable Interest; and, being desirous to serve his Country in Parliament, he declared himself a Candidate in the End of last Summer.

This Declaration alarmed Mr. *Dempster*, and the Progress which he saw his Opponent making in the Burghs, induced him rashly to resolve upon Measures in support of his Interest, which, it is hoped, he never would have resorted to, had not his Eagerness prevented him from coolly reflecting how improper and unconstitutional a Part he was about to act.

In what Manner Mr. *Dempster* proceeded in the other Burghs, it is not *hujus loci* to enquire; it is his Conduct in the Town of *Cupar* alone to which the present Prosecution relates.

Upon his Arrival at that Town, he immediately discovered, that, without having Recourse to Bribery and Corruption, he could have no Expectation of procuring the Voice of the Burgh in his favour, or of introducing into the Magistracy and Council,

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at the last annual *Michaelmas* Election, such a Set of Magistrates and Counsellors for the present Year, as would secure to him a Majority of Votes in the Election of the Delegate to be appointed by the Burgh for choosing a Burges to represent the District in the next ensuing Parliament, he therefore resolved to resort to this Method of Solicitation, and his Offers were so high as to have Influence upon several Members of the Council, though others, who were possessed of more Virtue, resisted every Attempt that was made to corrupt them.

Although Mr. *Dempster* endeavoured to conceal, as much as possible, the illegal Practices which he was thus carrying on, they were too general to remain secret, the Consequence whereof was, that, upon an Application to the Sheriff of the County, a Warrant of Commitment was granted against him, and he was obliged to find Bail to stand Trial for his Offences.

Mr. *Geddie* was, at that Time, eldest Baillie of the Burgh, and, as he considered it to be his Duty to protect its Freedom and Independency, and to secure the Morals of its Inhabitants from being corrupted from such Practices in Time coming, he early resolved to bring Mr. *Dempster* to publick Justice; and Mr. *Mackintosh*, who was chosen a Counsellor at the last *Michaelmas* Election, and was put upon the Leet for being Provost, heartily concurred with him in the intended Prosecution.

Criminal Letters were accordingly raised at the Instance of Mr. *Geddie* and Mr. *Mackintosh*, with the Concourse of his Majesty's Advocate, and were executed against Mr. *Dempster* upon the 21st of November last.

It was natural to expect that Mr. *Dempster*, had he been conscious of his Innocence, would have sought the earliest Opportunity of justifying himself, but, instead of doing so, he thought proper to prefer a Petition to the Court, upon the 26th of November, in which, after insisting that his Privilege as a Member of Parliament exempted him from the Necessity of granting Bail to stand Trial, he prayed your Lordships to stit all further Proceedings upon the Criminal Letters raised against him during the Session of Parliament, that he might not be further molested or hindered in the Attendance of his Duty in Parliament, and that the Privileges of that most Honourable House, whereof he was a Member, might not be violated or infringed in his Person.

Upon

Upon this Petition your Lordships were pleased to pronounce the following Deliverance on the 26th of November last : " The Lords Justice Clerk and Commissioners of Justiciary having considered the foregoing Petition, they appoint the same to be intimated to *Robert Geddie* and Mr. *Robert Mackintosh*, the two Complainers, mentioned in the foregoing Petition, or either of them, or to their known Council or Agent, by delivering an exact Copy of the said Petition, and this Deliverance thereon, to the said Parties, Council, or Agent, and ordain them to put in their Answers thereto within forty-eight Hours after such Service, with Certification."

In obedience to this Appointment, Answers were put in by the Prosecutors, and, upon advising Petition and Answers, and hearing Council upon the Question of Privilege, your Lordships were pleased, upon the 7th of December last, to pronounce an Interlocutor in the following Terms : The Lords Justice Clerk, and Commissioners of Justiciary, find, that this Court can issue no Warrant for apprehending the Person of *George Dempster*, Esq; Member of Parliament, nor for compelling him to find Bail to appear and stand Trial upon the Criminal Letters mentioned in the said Petition, during the sitting of Parliament, or within the Time of Privilege, and therefore declare they will adjourn the Diet of the said Criminal Letters, from time to time, during the Continuance of said Privilege."

And, of the same Date, your Lordships pronounced another Interlocutor, in the following Terms : " The Lords Justice Clerk, and Commissioners of Justiciary, having considered the foregoing Resolution of Court, continue the Diet at the Instance of *Robert Geddie*, and Mr. *Robert Mackintosh* Advocate, with Consent of his Majesty's Advocate, against *George Dempster* of *Dunichen*, Esq; Advocate, till the second Monday of March next to come, and ordain Parties, Assessors, Witnesses, and all concerned, then to attend, each under the Pains of Law."

Against these Interlocutors, and another Interlocutor of 14th December, not necessary to be here stated, the Prosecutors entered an Appeal to the House of Lords, and, upon the 7th of March last, that Right Honourable House pronounced the following Judgment :

" Upon Report from the Lords Committees, to whom it was referred to consider, whether the Appeal, wherein *Robert Geddie* junior, Merchant, and *Robert Mackintosh*, are Appellants, and *George Dempster*, Esq; and *Christianus Adamson*, are Respondents ;

" being

“ being an Appeal from two Interlocutors of the Court of Justiciary in *Edinburgh*, of the 7th of *December* 1767, and also another Interlocutor of the said Court of the 14th of *December* 1767, be properly brought: It is ordered by the Lords Spiritual and Temporal in Parliament assembled, that the Petitioners do, by themselves or Agents, attend the Court of Justiciary on *Monday* next, being the Day to which the Diet is continued by their second Interlocutor, bearing Date the 7th *December* last; and, in case the Declaration in their first Interlocutor, bearing Date the same Day, should be pleaded as a Bar to the due Course of Justice, then, that the Petitioners do apply to the said Court, to reconsider whether they were authorised by the Common or Statute Law of the Land, to take Cognizance of the Subject-matter, and to make such Declaration. And it is further ordered, that the said Court be at liberty to proceed notwithstanding the said Appeal.”

The Prosecutors accordingly appeared upon the said 14th of *March* by their Council; but Mr. *Dempster* not having then arrived in *Scotland*, your Lordships adjourned the Diet till *Friday* the 18th of the same Month.

Mr. *Dempster* having appeared upon that Day, the Council for the Prosecutors moved the Court, that the Criminal Letters might be called, and the Trial proceed.

To this Mr. *Dempster* answered, “ That in moving a Plea of Privilege, he had never any other Intention but that he might not be obstructed in his Attendance in Parliament, which he considered as a Duty superior to that of every other Kind; that this Reason had now ceased, and therefore, although it was his Opinion, and he could plead, that Privilege of Parliament extended to every Case, except Treason, Felony, and Breach of the Peace, still he did not desire to rest upon any such Defence, but was willing to go to Trial, in such Time as the Court should direct, having due Consideration to the Conveniency of all Parties concerned.”

Upon this your Lordships pronounced the following Interlocutor: “ The Lords Justice Clerk, and Lords Commissioners of Justiciary, having considered their Interlocutor of the 7th of *December* last, with the Judgment of the House of Peers of the 7th of *March* current; and what is before represented, in respect the Defender does not insist on his Plea of Privilege, as sustained by

“ said

“ said Interlocutor, find there is no Place in this Case to reconsider
 “ the Ground of the said Interlocutor; but, in respect of the said
 “ Judgment of the House of Peers, they declare that the said In-
 “ terlocutor shall be no Precedent to any future Case of the like
 “ Nature, and that the Matter shall be open to the Consideration
 “ of the Court upon any such future Case, in the same Manner as
 “ if the said Interlocutor had not past.”

The Criminal Letters were then read, and Mr. *Dempster* having denied the Charge therein contained, his Council represented, that “ as neither Mr. *Robert Mackintosh*, nor Mr. *Geddie*, the private Prosecutors, were present in Court, nor any Certificate nor legal Evidence given of their being unable, by Indisposition, to attend, the Diet ought to be deserted, the Pannel being precluded from their Oaths of Calumny, which he had a just Title to demand in this Prosecution; and that 18th December 1727, the Diet was deserted on the same Objection against *Campbell* and *Ewing*, then private Prosecutors.”

To this it was answered, that the Objection ought to have been moved *in initio litis*; that it was understood that the Trial was not to proceed at that Diet, and that, against next Diet, if the Pannel pleased, he might have the Prosecutors Oath of Calumny; upon which another Interlocutor was pronounced in the following Terms: “ The Lords Justice Clerk, and Commissioners of Justiciary, continue the Diet at the Instance of *Robert Mackintosh*, Esq; and *Robert Geddie*, with Concourse of his Majesty’s Advocate, against *George Dempster*, Esq; till Monday next, at Twelve o’Clock at Noon, in this Place, and ordain the Prosecutors then to attend personally in Court, and the Pannel, Witnesses, and Assizers, then to attend, each under the Pains of Law.”

The Court having met upon Monday the 21st, in terms of the above Adjournment, Mr. *Geddie* appeared, and offered his Oath of Calumny; but it was again moved upon the Part of Mr. *Dempster*, that as Mr. *Mackintosh* had not appeared, the Diet, in so far as respected him, ought to be deserted; but the Reasons of Mr. *Mackintosh*’s Absence having been set forth in a Petition, your Lordships pronounced the following Interlocutor: “ The Lords Justice Clerk, and Commissioners of Justiciary, having considered the foregoing Petition, and the Motion made for the Pannel, find there is sufficient Reason given to excuse Mr. *Mackintosh*’s Absence at this Diet, and therefore find the Trial may now proceed;

" but ordain Mr. Mackintosh to appear personally in Court at the next Diet, to which this Trial shall be adjourned."

Council were then heard upon the Competency and Relevancy of the Criminal Letters, upon which another Interlocutor was pronounced, of the same Date, in the following Terms : " Parties Procurators being heard at great Length, the Lords Justice Clerk, and Lords Commissioners of Justiciary, ordain both Parties to give in to the Clerk of Court Informations upon the Debate, the Prosecutors to give in theirs against the second Day of *May* next to come, and the Pannel to give in his against the second Day of *June* next to come; continue the Diet against the Pannel till that Time, and ordain Parties, Assizers, Witnesses, and all concerned, then to attend, each under the Pains of Law."

In obedience to this Appointment, the present Information is humbly offered upon the Part of the Prosecutors.

Before considering the Arguments which were maintained upon the Part of the Pannel, against the Competency and Relevancy of the Criminal Letters, it will not be improper to state shortly to your Lordships the Substance and general Import of these Letters.

The Major Proposition is expressed in the following Words : " That whereas, by the Laws of this Realm, every Act of Bribery and Corruption, and particularly, by the Laws and Constitution of this Realm, all corrupt and illegal Practices in the Election of Members to serve in Parliament, or to influence, procure, or bring about the same, or in any other Election, whereby the Election of a Member to Parliament may be influenced, procured, or brought about in a corrupt Manner, and by Means of Bribery and Corruption, or the corrupting, or attempting to corrupt, directly or indirectly, by any Gift or Reward, or by any Promise, Agreement, or Security for any Gift or Reward, or by any Offer of Money, either in Specie, or in Bank-notes or Bills, or of any other good Deeds, any Person or Persons, to give his or their Vote or Votes, or to forbear to give his or their Vote or Votes in any Election of a Member to serve in Parliament, for any Burgh, or District of Burghs, or in any Election of a Delegate or Commissioner from any Burgh, to choose a Member of Parliament for the District to which it belongs, or in the Election of publick Officers and Ministers of the Law, Magistrates and Rulers, who are intrusted with the Administration.

" Administration of Justice, and vested with Power, Authority,
 " Jurisdiction, and Government over their Fellow-subjects, espe-
 " cially Magistrates and Counsellors of any Royal Burgh; which
 " Magistrates and Counsellors, beside their other legal Powers, Au-
 " thority and Jurisdiction, by Law are intitled to vote in the Ele-
 " ction of the Delegate or Commissioner for the Burgh, for chus-
 " ing the Member to Parliament, who represents the Burgh, ARE
 " Crimes of a heinous Nature, and severely punishable, the more
 " especially, when such Acts of Bribery and Corruption, or At-
 " tempts to bribe and corrupt, are practised and committed by a
 " Member of Parliament, whose Duty it is, in a particular Man-
 " ner, to discourage and discountenance all such illegal Practices."

The Minor Proposition, in which the particular Facts offered to be proved are contained, sets forth, that the said *George Dempster*, Esq; after declaring himself a Candidate to represent the District, of which the Burgh of *Cupar in Fife* is one, in the next Parliament of *Great Britain*, " did, by himself, or by others employed by him, " corrupt, or attempt to corrupt, by Gifts or Rewards, or by Pro- " mises, Agreements, or Securities, for Gifts or Rewards, a Num- " ber of the Members of the Town-council of the said Burgh of " *Cupar in Fife*, elected at the annual *Michaelmas* Election in the " Year of our Lord 1766, who were the Electors, or had a Voice " in the Nomination and Election of the Counsellors and Magi- " strates for the present Year, from *Michaelmas 1767* to *Michaelmas* " 1768, and of the Deacons of Trade in the said Burgh, elected " at the last annual Election, who thereby came to have a Voice " in the Election of the Magistrates for the present Year, to elect " or appoint particular Persons into the Offices of Magistrates and " Counsellors of the said Burgh of *Cupar in Fife*, for the present " Year, or to elect or appoint into the said Offices such Persons as " he desired, or were, or as he thought, were, devoted to his In- " terest, or would serve his Views, and not to name or appoint " particular Persons, because they were not, or he thought they " were not, devoted to his Interest, and would not serve his Views; " and also, by the like unconstitutional Means, corrupted, or at- " tempted to corrupt, several of the Persons who he imagined " would be named Counsellors for the present Year, to give their " Votes for the same Set of Magistrates; and likeways, by the " same Gifts, or Rewards, or Promises, Agreements, or Securities " for Gifts or Rewards, did corrupt, or endeavour to corrupt,

" Numbers.

" Numbers of the Members of the Council for the present Year,
 " to give him their Interest in the Choice of the Commissioner or
 " Delegate to be appointed by the said Burgh of *Cupar in Fife*,
 " for the electing a Member of Parliament for the said District,
 " in any Election that might occur during their Continuance in
 " Council." It then proceeds more particularly to mention a
 Number of different Persons alledged to have been corrupted, or
 to have been attempted to be corrupted, by Mr. *Dempster*, or other
 Persons employed by him, for the Purposes aforesaid; and men-
 tions a Number of particular Circumstances relative to some of
 the Persons so named; after which it concludes with the follow-
 ing Words: "At least, the said *George Dempster* above complained
 " upon, is guilty, Actor, Art and Part of the Crimes of Bribery
 " and Corruption before mentioned, or of Attempts to bribe and
 " corrupt, and of the illegal and corrupt Practices before mention-
 " ed, for the Ends and Purposes before written."

Such being the Nature of the Major and Minor Propositions, the Criminal Letters conclude as follows: "All which Facts, or Part
 " thereof, or that he, the said *George Dempster*, is Art and Part of
 " all, or one or other of the foresaid Crimes, being found proven
 " by the Verdict of an Assize, before our Lords Justice General,
 " Justice-Clerk, and Commissioners of Justiciary, in a Court of
 " Justiciary to be held by them, within the Criminal Court-house
 " of *Edinburgh*, upon the 7th Day of *December* next to come, he, the
 " said *George Dempster*, ought to be punished with the Pains of
 " Law, to the Example and Terror of others to commit the like in
 " Time coming."

The above general Account of the Criminal Letters being pre-
 mised, the Prosecutors now proceed to consider the several Defences
 that were maintained upon the Part of the Pannel at the Pleading.

The first of those Defences was, that the Libel was not compe-
 tent, in respect it was not laid upon any particular Statute, but
 upon the Common Law, and that the Crime of Bribery was un-
 known in the Common Law of this Country: And, in Support
 of the last Branch of this Defence, Reference was made to Sir
George Mackenzie's Criminals, p. 174, where he mentions several
 Crimes punished amongst the *Romans*, which he supposes not to be
 directly in use in this Country; and the Prosecutors were called
 upon to produce one Instance of a Trial brought before the Court
 for this Crime.

But

But, in answer to this, it may be, in the *first place*, observed, That as several Statutes have passed, inflicting particular Penalties and Punishments upon those who are guilty of Corruption in Matters of Election, the Libel must be competent, in so far as it is applicable to these Statutes.

It was indeed maintained, upon the part of the Pannel, that no Indictment can be laid upon a Statute, without libelling the Statute itself; but this is a Doctrine to which the Prosecutors can by no means assent. Statutes are Part of the Law of the Realm; and, of consequence, a Libel that charges a certain Act or Deed to be a Crime by the Laws of the Realm, must be competent, whether such Act or Deed is understood to be of a criminal Nature by the Common Law, established by a Tract of Decisions, and inveterate Consuetude, or by a particular Statute, inflicting a particular Punishment.

To illustrate this Position seems altogether unnecessary. Many Acts of Parliament have passed with regard to the Crime of Theft, but few or no Indictments are to be met with that libel any of these Acts. It is sufficient that they mention the Act of Theft to be a Crime by the Laws of the Realm in general. Many other similar Instances might be pointed out, were it necessary: But it will be sufficient to observe, that the Doctrine here pleaded for the Pannel must resolve into this absurd Proposition, That an Act or Deed, which tends, if not to the immediate Subversion, at least to the imminent Danger of the Constitution, and against which severe Sanctions and Penalties have been enacted by Statute, is not a Crime by the Laws of the Realm.

There is indeed one Distinction betwixt Libels which are laid upon the Laws of the Realm in general, and those which are expressly laid upon particular Statutes, inflicting particular Punishments; but this Distinction affects not the Competency of the Libel, but the Power and Discretion of the Judges. The peculiar Situation of the Kingdom, at a particular Occasion, may render it necessary for the Legislature to enact a severer Punishment upon those who are guilty of particular Transgressions, than what such Transgressions were formerly understood to merit, or was imposed upon them by the more antient Law. In such Cases, a Libel may be laid either upon the Laws of the Realm in general, or upon the particular Statute, inflicting the severe Punishment. If it be laid on the Statute, the Judges will be bound to inflict that Punishment

that is common Law. It surely is not an absolute power in
Judges to force their fellow Citizens to make their Actions according
to their Opinion. This would be ^[10] a Detraction of the
Ment which the Statute enacts. But if it be laid in general Terms,
they are not bound to exert any further Severity than what was
understood to be the proper Punishment before such Statute was
enacted. This is a just Distinction, founded in Reason and Hu-
manity; but, to suppose that the Libel is not competent, because
it does not recite a particular Statute, inflicting a particular Punish-
ment, seems to be not a little absurd.

In the next place, the Prosecutors, with Submission, apprehend,
that the Facts charged in the criminal Letters, constitute a Crime
by the Common Law of this Country, independent of the parti-
cular Statutes that have lately been enacted. \times

The Council for the Pannel were anxious to confine the Idea of
the Word *Common Law* within very narrow Bounds, as if nothing
was to be thereby understood, but the Custom and Practice of
the Country, established by Judgments of the supreme Courts;
and, because no Instances were given, upon the part of the Prose-
cutors, of Trials of this kind from the Books of Adjournal, they
hastily concluded, that Bribing was not a Crime at Common
Law.

But this Argument proves too much. There are many Crimes
known in the Law of this Country, and to which severe Punish-
ments are annexed, that are not mentioned in any Statute what-
ever. They have indeed been frequently the Subject of Trials,
and the Persons guilty of them have been condemned. But, how
came the first Person that was tried for such Crimes to be con-
demned? No Statute could be urged against him; and, if the
Pannel's Doctrine be true, it was equally impossible to alledge,
that the Transgression laid to his Charge was a Crime at Common
Law, which, according to his Argument, supposes a Course of
Judgments in the criminal Court, as the only *succedaneum*, in
Cases where there is no positive Statute.

But further, the Prosecutors apprehend themselves to be well
intitled to maintain that the Facts charged in the present Libel are
criminal by the Common Law of this Realm, in respect that Bri-
bery was a Crime by the Law of the *Romans*, which in several
Acts of Parliament is admitted to be the Common Law of the
Kingdom, and which, according to the Writers of this Country,
both Lawyers and Historians, is acknowledged to be our Rule,
where our own Statutes and Customs are silent or deficient. See
Skene's Annotations upon Regiam Majestatem, l. 1. c. 7. ver. 2.—

Craig,
is that where the original Receipt or making of
Law seems to be of two sorts 1. When a Statute
privily enacted but is now lost this may be called the
Goodition in opposition to the Law of Record the memory
not by record but handed down by Lawmen of

Craig, l. 1. Dieg. 2.—Leslie, l. 1. cap. leg. Scot.—Boet. l. 5 hist.—Camer. de Scot. doctr. l. 2. cap. 4.—Nor will the Passage quoted from Sir George Mackenzie's Criminals avail the Pannel; for tho' he ranks the *crimen ambitus* amongst those which are not directly in use with us, which was extremely natural, considering how little it was practised in his Days, yet, in the latter Part of his Observations, he plainly shows it to be his Opinion that it was punishable in this Country as well as amongst the Romans.—His Words are: “ And since Commissioners for Parliaments, and Magistrates of Towns are still elected by Plurality of Suffrages, I see not why such as bribe the Electors may not be liable to the same Accusation. The Punishment of this Crime was Deportation, which was much like our Banishment. And in the lesser Towns it was punished by a Fine of a hundred Crowns, and Infamy. And since it is a Kind of bribing, I think it should be punished with us as such.”

That Bribery in Matters of Election was a Crime prior to the Statutes which have been particularly directed to the Prevention of it, is likeways clear from the Preamble of the Act of George II. which begins with the following Words: “ Whereas it is found by Experience, that the Laws already in being have not been sufficient to prevent corrupt and illegal Practices in the Election of Members to serve in Parliament, &c.—These Words plainly shew that this Statute was by no means creative of a new Crime, formerly unknown in the Law; and that, on the contrary, it was only enacted to give a new Remedy, by inferring certain Penalties and Disqualifications, and making it in Effect the Object of a Civil Action to any common Informer.

The Council for the Pannel endeavoured likeways to support this Plea of Incompetency by Analogy. They observed, that no Prosecution lies at Common Law against Usurers or Smugglers, although such Persons may, with the strictest Propriety be considered as guilty of criminal Acts.

But, with respect to Usurers, the Council for the Pannel seem to have altogether misapprehended the Law. It appears indeed, that by our old Law, Usury could not have been made the Foundation of a Prosecution during the Usurer's Life; but, in case he repented not before his Death, his whole moveable Goods and Chattels were forfeited to the King, and his Heirs were likeways deprived of his Heritage, as appears from the *Regiam Majestatem*, l. 2.

it relates to abolished the punishment of cap.
it is derived its original from the Regiam of the
and is ratified & confirmed by the Judgment of the
Institue

By the Common Law of Rome Bribery was no crime and not be punished it was the Statute of the Lex Julia

the first recites cap. 54.—Besides, the Statute of James VI. Parl. 11. cap. 52. which is the first Act of Parliament made against Usurers, appoints them to be punished conform to the Laws of the Realm, which shews that at that Time it was understood to be a Crime at Common Law.

*Law of 16 May
then lies as Mar
Ja: 6 James
understood to
a Crime at Common
Law.* Nor can the Pannel avail himself in the smallest Degree, of the Declaration made by the Justices, in the Case of *Hugh Roxburgh*, as stated by Sir George Mackenzie, in his Title of *Usury*, because, in that Case, the Question was not, Whether Usury was punishable as a Crime, but only, whether the taking more Interest than 6*l. per cent.* could infer Usury, as the Act 1649, by which Interest was reduced to so low a Rate, was rescinded after the Restoration.

Again, with regard to Smuggling, the Prosecutors can, by no means, agree, that it is not an Offence, even at Common Law, and, as such, the proper Subject of a criminal Prosecution, though no Case may hitherto have occurred, where it was thought expedient to bring such Offenders to Trial, otherways than by Prosecutions upon the Revenue-statutes, for Recovery of the Forfeitures and Penalties thereby inflicted; it is a Species of Theft, whereby the Crown is defrauded of its just Rights, by the criminal Act of the Person guilty; and therefore, as every other Offence of that Nature committed against the Statute Law of this Country, and whereby third Parties suffer Damage, might be criminally prosecuted; but, be that as it will, no Argument can from thence proceed by Analogy to the Case in hand.

Bribery, in Matters of Election, is a Transgression of a very different Nature, tending not only to corrupt the Morals of the People in general, but likeways dangerous in the highest Degree to the Constitution itself; for, as is well said by an eminent Writer on the Criminal Law of *England*: “ Nothing can be more palpably prejudicial to the Good of the Publick, than to have Places of the highest Concernment, on the due Execution whereof the Happiness of both King and People doth depend, disposed of, not to these who are most able to execute them, but to those who are most able to pay for them; nor, can any thing be a greater Discouragement to Industry and Virtue, than to see these Places of Trust and Honour, which ought to be the Rewards of these, who by their Industry and Diligence, have qualified themselves for them, conferred on such, who have no other Recommendation, but that of being the highest Bidder; neither can any thing

“ thing be a greater Temptation to Officers to abuse their Power
 “ by Bribery and Extortion, and other Acts of Injustice, than the
 “ Consideration of the great Expence they were at in gaining
 “ their Places, and the Necessity of some times straining a Point,
 “ to make their Bargain answer their Expectation.”

It was further argued upon the Part of the Pannel, That, as the Statute of the second of the late King, imposing Penalties and Disqualifications upon those, who should be guilty of Corruption in the Election of a Member of Parliament, was extended by the Act of the 16th of his late Majesty, to the Election of Commissioners from Burghs, it from thence appears, that Bribery, in the Election of Magistrates and Counsellors, was, *ex propenso*, omitted, and that, on that account, the Criminal Letters are altogether incompetent, in so far as they charge the Pannel to have been guilty of Bribery, in order to influence the last *Michaelmas* Election.

But to this an obvious Answer occurs, *viz.* that the Criminal Letters are not laid upon these Statutes in particular, but upon the Laws of the Realm in general; and, if Bribery in the Election of a Commissioner or Delegate from a Burgh, is a Crime at Common Law, every Act of Bribery committed with the same View must be equally criminal; and it is particularly charged in the present Case, that the Bribery committed at the annual *Michaelmas* Election, was done, with the view of securing to the Pannel a Majority of Votes in the Election of a Commissioner or Delegate to be chosen by the Burgh. How far the Objection might go, had the Criminal Letters been laid upon the Statutes only, it is not *hujus loci* to enquire.

The next Defence stated for the Pannel was, that, by the established Practice of the Criminal Court, every Prosecution must be brought, either at the Instance of his Majesty's Advocate, or in the name of a private Party having Interest, but that the present Prosecution was brought by private Parties, who qualify no Interest, and who conclude merely *ad vindictam publicam*.

The Council for the Pannel seemed to lay their chief Stress upon this Plea, and spoke to it at great Length; they observed, that, even in Republicks, the bad Consequences arising from admitting popular Actions were very soon discovered; that, in order to prevent these Consequences, an Oath of Calumny was first invented; and that not being sufficient, the *subscriptio in crimen*, by which

the Prosecutor bound himself to suffer the Punishment of the Law, in the Event of his failing to convict the Pannel, was found necessary to put a Stop to wanton and vexatious Actions ; that this last Remedy, however, came not only to be a complete Bar to false Accusations, but likewise a total Prohibition of Prosecutions at the Instance of private Persons, no Man being willing to venture his Life and Fortune in bringing to Punishment a Criminal who had done him no personal Injury, however beneficial it might be to the State to have the Criminal destroyed ; and therefore, in all modern Governments, it was an established System to reject popular Actions ; that, in *England*, though every Man may present a Bill to a Grand Jury, yet that Jury must find the Bill true, before a Person accused of a Crime can be brought to a Petty Jury ; and that no Information can be filed, in Matters criminal, but by the Attorney General, *ex officio*, or upon Leave given by the Court ; that, in this Part of the united Kingdom, the King's Advocate stands in place of the Grand Jury ; and that, although he cannot refuse his Concurrence to a Party having Interest to prosecute, no Example can be given of a private Prosecution having been sustained in this Court, except where an Interest, either in Property, Person, or Character has occurred ; that the sustaining the Titles of the present Prosecutors, would be allowing a Precedent for these popular Actions, which the Laws and Constitution of this Kingdom have so wisely endeavoured to restrain, and that the Criminal Court, in that Event, would be harassed with an infinity of wanton and groundless Prosecutions.

In answer to this, the Prosecutors will readily admit the superior Wisdom of modern Governments, in appointing a *calumniator publicus*, for the Prosecution of publick Crimes, and in restraining those who can qualify no Interest, more than any other Individual, from maintaining criminal Prosecutions ; but, at the same time, they apprehend, that it would be of equally dangerous Consequence, to confine what is called an Interest within too narrow Limits, especially in Crimes which have an immediate Tendency to affect the Well-being of the Constitution ; and it will appear, upon Reflection, that the Doctrine laid down by the Pannel's Council goes too far.

It will not be denied that a Son, or any other near Relation, is intitled to prosecute, in his own Name, for Murder, yet it cannot be said, that such Prosecutor is hurt either in his Person, Goods, or

or Character, and the Criminal Prosecution can go no further than to obtain publick Vengeance ; it is true, indeed, that he is connected by Family with the Person murdered, and therefore a new Interest appears ; and, of consequence, it would seem to follow, that every Person who can show that he has a Connexion with the Subject of the Prosecution, which the Lieges, in general, have not, must have an Interest to maintain the Action in his own Name, without the Instance of his Majesty's Advocate.

To apply this Principle to the present Case, it will only be necessary to consider the Character in which the Prosecutors appear on the Face of the Criminal Letters.

Mr. *Geddie* was a Baillie in the Burgh, at the very Time of the Transgressions which are the Subject of the present Prosecution ; he falls therefore to be considered as one of the Guardians and Protectors of the Freedom and Independency of the Burgh ; it was his Duty to maintain them by every lawful Means, and it was equally his Duty to take every Measure that might have the Effect to prevent, in Time coming, an Attack upon the Purity or Chastity of the Burgh, or upon the Morals of its Inhabitants. But no other Method could be so effectual for that Purpose as a Criminal Prosecution of this Kind. The wisest Laws are of no Significance, unless they are carried into Execution, whereas one Example of publick Justice upon the Transgressors of these Laws may be the Means of rendering a second Exertion of them altogether unnecessary.

Let it be supposed, that the *Michaelmas* Election of Magistrates and Counsellors had been overawed by Force, and that thereby Mr. *Dempster* had been able to introduce such a Set of Magistrates and Counsellors as would secure to him a Majority of Votes in the Election of a Delegate to be chosen by the Bargh ; would it not, in that Event, have been competent to Mr. *Geddie*, as one of the chief Magistrates of the Place, to have maintained a Criminal Prosecution against those who had used the Force ? It is humbly thought, that such Prosecution would have been perfectly competent ; and, if so, it is difficult to conceive why it should not be equally competent to him to prosecute those who have been guilty of Bribery for the like Purposes.

Again, with regard to Mr. *Mackintosh*, he had declared himself a Candidate for being chosen to serve as Member of Parliament for the

the District, before any of the Acts of Bribery libelled had been committed, and was chosen a Guild-counsellor of the Burgh of *Cupar in Fife* at the last *Michaelmas* Election, and put upon the Leet for the Office of Provost, unless therefore he can be allowed to have an Interest, it is absolutely impossible to figure an Interest that any private Party can have to prosecute for a Crime of this Nature; the Bribery was directly levelled at him, and was practised with no other View than to overturn the Interest he had established in the Burgh, and to secure to the Pannel a Majority of Voices in the Election of the Delegate.

It was indeed observed, that the Loss which Mr. *Mackintosh* has suffered, may be repaired by the Civil Action depending before the Court of Session; but that is a Matter of no Consequence to the present Question; a Person, whose Goods have been stole, may sue for Restitution before the Civil Court; nay, he may vindicate them from a third Party; but, this notwithstanding, he will be intitled to maintain a criminal Prosecution against the Thief, *ad vindictam publicam*.

The Prosecutors will beg leave to mention an Example of a criminal Prosecution, sustained at the Instance of a private Party, where his Interest was much more remote than theirs, *viz.* the Case of Mr. *Lockhart of Lee*, who maintained a criminal Action at his own Instance, against certain Persons who had been guilty of Riots in the Town of *Lanerk*, in opposition to the Settlement of a Reverend Gentleman, to whom, as Patron of the Parish, he had given a Presentation. It cannot be said, that Mr. *Lockhart* was by these Riots hurt, either in his Person, Goods, Family, or Character; yet, this notwithstanding, his Connexion with the Cause of the Riots, was deemed a sufficient Interest to intitle him to maintain the Suit, and several of the Pannels were found guilty, and condemned.

Nor will the allowing Persons to prosecute, who have such an Interest as the present Prosecutors, ever be attended with any bad Consequences. The Concurrence of his Majesty's Advocate is absolutely required; and although few Instances may be found, where it has been necessary for him to refuse that Concurrence, yet, if he is satisfied, and can show that there is no Foundation for a Prosecution, he must certainly be intitled to with-hold it; it is made necessary, in order to give a Check to private Parties, whose Resentment may sometimes carry them beyond proper Bounds. It is therefore

therefore absurd to suppose, that he is obliged to grant it in every Case. On the other hand, the Prosecutors will be allowed to say, that if the Objection made to their Title shall be sustained, no Prosecution of this Kind may probably ever take place: Transgressions of this Nature, however prejudicial to the Constitution, are become too common to be viewed by the Generality of the People in that Light in which they ought to appear; and perhaps a publick Officer might be thought rather too rigorous, were he, of his own Accord, to apply to the Criminal Courts against the Offenders, who are generally Men of Rank and Fortune, and who, were it not for their Error in overlooking the Consequences, and bad Tendency of their Misconduct in that Particular, would be most worthy of the publick Esteem; and the Prosecutors will be allowed to think, that, on that account, it would be more expedient to sustain the Title of those who are immediately affected with the Consequences of the Bribery, and who are connected as Magistrates and Counsellors with the Burgh where it has been practised, than to find that they have no Interest to prosecute.

It was observed by one of the Council for the Pannel, that Sir *John Gordon* had admitted his having no Interest to prosecute as a private Party, when he insisted, that the Lord Advocate should, at his own Instance, prosecute a Gentleman upon the Common Law, who was accused of having been guilty of Corruption in a Northern Burgh; but Sir *John Gordon* was no Magistrate or Counsellor of that Burgh, nor had he any Connexion with it; he was only *quilibet ex populo*, and as those, in whose Name the Civil Prosecution had been carried on, were unwilling to become Prosecutors in a Criminal Action, he had no other Method left but by applying to the publick Prosecutor to take up the Cudgels for the publick Interest.

The only other Defence pleaded upon the Part of the Pannel was, that the Libel, so far as it subsumed that he had attempted to corrupt, or attempted to procure, and made Offers which were not accepted of, was clearly not relevant.

The Prosecutors will readily agree, that a mere Intention to commit a Crime, where no ouvert Act is done, with a view to carry it into Execution, is not the Subject of Punishment. It is indeed impossible to prove such Intention, and even though it were capable of Proof, it ought to be presumed, that he who had done nothing to carry it into Execution, had immediately repented of it: But

the Case is very different, where not only an Intention is conceived in the Mind, but likeways an Attempt made to execute that Intention. In that Case there is no Room for the Presumption of Repentance, and Punishment ought to be inflicted, though, no doubt, the Measure thereof ought greatly to depend upon the Nature and Mode of the Attempt.

That this was the Doctrine of the Roman Law, there cannot be a Doubt. Many Texts might be quoted in proof of it, but two or three only shall be mentioned. In L. 1. Pr. ff. De extraord. crim. it is said, "Solicitatores alienarum nuptiarum, itemque "matrimoniorum interpellatores, etsi effectu sceleris potiri non "possunt, propter voluntatem pernicioſæ libidinis extra ordinem "puniuntur."—And, in § 2d of the same Law, "Qui pueru stu- "prum, abducto ab eo vel corrupto comite, persuaserit, aut mu- "lierem puellamve interpellaverit, quidve impudicitiaſæ gratia fe- "cerit, donum præbuerit, pretiumve, quo iis persuadeat, dederit, "perfecto flagitio, puniuntur capite imperfecto, in insulam de- "portantur corrupti comites, summo suppicio adſciuntur."

The *Lex Cornelia de Sicariis*, likeways not only punished those who were guilty of actual Murder, but also those "qui homines "occidendi furtive faciendi cauſa cum telo ambulaverint. L. 1. "Ad Leg. Cornel. de Sic. et Venefic." Or, "Qui venenum necandi "hominis cauſa fecerint, vel vendiderint, vel habuerint."

The different Degrees of Punishment, to be inflicted on those who attempted to commit Crimes, are accurately laid down by *Puffendorff*, in his Treatise *De Jure Naturæ et Gentium*, Lib. 8. Cap. 3. § 18. "Circa singula horum delictorum primum locum obtinent "delicta consummata; postremum, quæ ad actus aliquos, non ta- "men ultimum, processerunt, in quibus tanto quodque est gra- "vius, quo ulterius processit. Ubi observandum naturaliter pro- "positum et desiderium facinus aliquod patrandi, haudquaquam "pari gravitate cum ipso facinore perfecto censi posse; quippe "cum longe atrocior fæſe mali facies animo repræſentat. Quan- "do igitur aliquando voluntas facto æquipollere dicitur, id in- "telligendum est de illa voluntate quæ cum extremo conatu con- "juncta est. Sic ut inter hanc, et eventum facinoris, nulla nova "voluntatis operatio locum habuerit, etsi successus destinatus "defecerit."

The same Doctrine is laid down by Sir George Mackenzie, in his Treatise of *Criminals*, Tit. 1. § 4. "It is likeways much de- "bated,

" bated, whether an Endeavour to commit a Crime be a Crime,
 " albeit the Effect follow not, and albeit it be a Rule in the Civil
 " Law, that, *in maleficiis voluntas spectatur, non exitus, L. 1.*
 " § 14. *Divus. ff. ad leg. Corn. de siccari.* yet it is generally con-
 " cluded, by the Practicians of all Nations, that *simplex conatus,*
 " or Endeavour, is not now punishable by Death, *Clar. Quest 91.*
 " *Gothofr. § . Conatus.* But, for clearing this according to the
 " Principles of Reason, I shall form these Conclusions: *first,* That
 " all Endeavour is an Offence against the Commonwealth, though
 " nothing follow thereupon; albeit sometimes the Punishment be
 " connived at, or mitigated, according to the several Degrees of
 " Malice; but that it is in itself criminal, appears from this,
 " that simple Design is punishable in Treason, and some other a-
 " trocious Crimes, because in these, especially in Treason, it
 " would be too late to provide a Remedy when the Crime is com-
 " mitted. *Second,* In less atrocious Crimes the Design is punished,
 " if the Committer proceeded to act that which approached nearly
 " to the Crime itself, *si deventum sit ad actum maleficio proximum.*
 " —But this is not *simplex conatus*, but, in Effect, is a lesser De-
 " gree of the Crime to which it approaches; as if a Thief have
 " put Ladders to the House which he resolved to rob; or, if he
 " mix Poison, but the Potion be spilt upon the Ground by an Ac-
 " cident: And albeit it be commonly received, that, even in these
 " Cases, *affactus non est puniendus sine effectu*, by the same Punishment,
 " with the Crime designed, yet I would distinguish in this be-
 " twixt an Effect disappointed by an intervening Accident, and
 " that which is stopt by the Repentence of the Committer; for,
 " where the Design was only disappointed, I think the ordinary
 " Punishments should not be remitted, in Cases, *ubi deventum est*
 " *ad actum proximum.*""

After what has been said, it will require few Words to show,
 that he who attempts to corrupt, by Offers, or Promises of Money
 or Rewards, is equally guilty, whether these Offers or Promises are
 accepted or not. He has done every thing upon his part to the
 Completion of the Crime; and he ought not to be allowed to
 avail himself of the Virtue of those to whom the Offers or Promises
 were made.

The Crime, most similar to that which is the Subject of the pre-
 sent Prosecution, is the bribing of Judges; and the same Author,
 who was last appealed to, lays it down as an established Rule, that
 the

the Attempt, *ubi pervenit ad actum proximum*, is equally punishable as if it had taken Effect. " He also who corrupts the Judges is punishable with the Punishment of Falsehood. *Gloss. ad L. qui explicandi, C. de Aecus.* which holds, though the Judge accepts not the Bribe; he is punishable if he endeavours, *pervenit ad actum proximum*. *Menoch. de Arb. Cas. 343.*" Mackenzie's *Criminals*, Lib. I. Tit. 25, § 3.

The Prosecutors having thus considered the whole of the Defences that were stated upon the part of the Pannel at the Pleading, they will detain your Lordships no longer. They are hopeful, that they have sufficiently answered each of these Defences, and that the Court will have no Difficulty of finding the Libel relevant and competent at their Instance, and remitting the Pannel to the Knowledge of an Assize.

In respect whereof, &c.

ALEX. WIGHT.